Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor

HIGH COURT (KUANTAN) — ORIGINATING MOTION NO 25–9 OF 1998
SURAYA OTHMAN JC
6 JUNE 2008

Administrative Law — Judicial review — Application for — Order of certiorari to quash decision of first respondent — Whether first respondent had committed error of law by his failure to take into account matters which he ought to take into account — Whether first respondent had misdirected himself in fact and law by taking into consideration applicant's seasonal employees when coming to his decision — Whether decision by first respondent was tainted by illegality, irrationality and procedural impropriety — Trade Unions Act 1959 — Industrial Relations Act 1967

Statutory Interpretation — Construction of statutes — Intention of statute — Purpose of — Whether Industrial Relations Act 1967 makes a distinction between permanent and seasonal workmen — Whether distinction would lead to absurdity — Interpretation Acts 1948 and 1967 s 17A — Industrial Relations Act 1967 s 2

Words and Phrases — Meaning of seasonal employees — Whether definition of 'workman' under s 2 of the Industrial Relations Act 1967 excludes seasonal employees

Holiday Villages of Malaysia Sdn Bhd (the applicant) owned and operated an integrated holiday village complex Club Mediterranean Cherating Resort Village (the resort). According to the applicant, it employed two categories of employees in its establishment, namely permanent and seasonal employees; the latter type of employees referred to those who were employed for a maximum of ten months, that is from February to November, and who ceased to be employed when the resort was closed for business during the 'monsoon period'. On 10 September 1997, the second respondent, a trade union of workmen registered under the Trade Unions Act 1959 (the TU Act), claimed recognition from the applicant to represent all the applicant's employees excluding those in managerial, executive, confidential and security capacity with effect from 10 September, 1997. When the applicant failed to

comply, the second respondent notified the Director General of the Industrial Relations (DGIR) and requested the DGIR to take action against the applicant under s 9(4) of the Industrial Relations Act 1967 ('the IRA'). Thereafter the Industrial Relations Department ('the IRD') requested the applicant to submit a list of its employees as at 10 September 1997, excluding those in managerial, executive, confidential and security capacity. At the same time the IRD also requested the second respondent to submit a list of the applicant's employees who were members of the second respondent. Thereafter, the second respondent made a complaint to the IRD about the applicant's failure to employ some 80 employees as from 6 November 1997, without any letter to that effect. In response the applicant alleged that between the period of 2 November 1997 and 8 November 1997, 86.5% of its employees had ended their contract leaving only 13.5% to continue with their employment. As proof the applicant submitted a list of its employees both permanent and seasonal (the list) as at 10 September 1997. As such the applicant requested the DGIR to carry out a membership verification before deciding whether to accord recognition to the second respondent. The second respondent in turn submitted a Form C which contained a list of its members. Accordingly a membership verification exercise was conducted and the results of this exercise showed that 59.32% of the applicant's employees were members of the union. When the applicant continued not to accord recognition to the second respondent despite the results of the exercise, the DGIR gave notice under s 9(4C) of the IRA to the applicant. In reply the applicant alleged that less than 10% of the applicant's permanent employees were members of the second respondent and that it was impossible that 50% of the applicant's permanent and seasonal employees were members. Thereafter the first respondent informed the applicant and the second respondent of its decision under s 9(5) of the IRA by which he had ordered the applicant to recognise the second respondent as a trade union representing all the applicant's employees with effect from 10 September 1997. This decision by the first respondent is now being challenged by the applicant on the grounds that the first respondent had committed an error of law by his failure to take into account matters which he ought to take into account; had misdirected himself in fact and law by taking into consideration the applicant's seasonal employees when coming to his decision; that as the result of this the decision by the first respondent is tainted by illegality, irrationality and procedural impropriety. Under these grounds the applicant was seeking judicial review for an order of certiorari to quash the decision of the first respondent. It was agreed by all the parties that this court had jurisdiction upon this matter and that for the purposes of this application the relevant date to focus upon on issues was 10 September 1997. The main thrust of the applicant's challenge was premised upon one main issue, that was, whether the first respondent ought to have included the applicant's

seasonal employees as part of the applicant's employees as at 10 September 1997 in according recognition to the second respondent. A

Held, dismissing the application with costs: B

(1) The DGIR in carrying out its functions under s 9 of the IRA and reg 4 of the Industrial Relations Regulations ('IRR') had requested the Trade Union's Department to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition was made were members of the second respondent. This required the Trade Union's Department to carry out a membership verification exercise to arrive at the percentage of the workmen in respect of whom recognition was sought, who were members of the second respondent. The manner of calculation employed to arrive at the figure 59.32% was as prescribed under reg 65 of the Trade Union Regulations. Therefore it could be seen that the Trade Union's Department had followed strictly the letter of the law in coming to its conclusion on the percentage of workmen (see paras 35–36). C D

(2) The law only requires the first respondent to ascertain the percentage of trade union membership within the second respondent's scope of representation as at the date of claim of recognition ie 10 September 1997 and not any other dates. Therefore the membership verification exercise done for the claim for recognition was based on the number of workmen as at the correct date. The fact that 86.5% of the applicant's employees were no longer in the employment of the applicant as at 16 December 1997 was of no relevance and not a factor for consideration in calculating the percentage. In any case the applicant was bound by the fact that it had requested that for the purpose of recognition, both the permanent and seasonal employees had to be taken into account. In addition the applicant's exhibits showed that the majority of the employees employed by the applicant as at 10 September 1997 were also employed by the applicant from January 1998, therefore there was sufficient material and evidence to support the finding that the percentage of membership as at 10 September 1997 was 59.32%. This meant that the first respondent had taken into account all relevant matters when he made his decision and the applicant's challenge on this ground must fail (see paras 39 & 42). E F G H

(3) There was no legal requirement for the first respondent to distinguish between seasonal or permanent workmen for purposes of trade union recognition. The terms 'workman' and 'contract of employment' as defined under s 2 of the IRA do not exclude seasonal employees, because they do not spell out the duration of employment needed before one can be considered a 'workman' and thus receive protection I

under the Act. As such there was no distinction between permanent and seasonal employees as far as the law is concerned and the latter class of employees should be treated the same. Moreover s 17A of the Interpretation Acts 1948 and 1967 requires due regard to be given to the purpose of the Act. Therefore to promote the purpose or object of the IRA, there should not be any distinction between seasonal and permanent employees because otherwise it would lead to absurdity, for all an employer would need to do would be to classify his employees as 'seasonal employees' and thereby escape the statutory liabilities of the IRA. Thus, the second ground of challenge against the first respondent that he had misdirected himself in fact and law by taking into consideration the applicant's seasonal employees when coming into his decision must fail (see para 43).

(4) The applicant in its letter to the DGIR had clearly stated that both seasonal and permanent employees must be taken into account before recognition could be accorded to the second respondent and for membership verification and the first respondent had acquiesced to this. However, before the court the applicant had submitted that since the seasonal employees will not be with the applicant as at 10 September 1997, they should not be included in calculating the percentage of workers. Therefore the applicant's stand was convoluted and a contradiction in terms and the applicant should be estopped in raising this issue, which was a non-issue, again. The first respondent had all along clearly and unequivocally maintained that he had taken both seasonal and permanent employees into account even though a majority of them had left the applicant's service after November 1997, since these employees were as at 10 September 1997, the date recognition was sought, still the employees of the applicant. After perusing the first respondent's affidavit and exhibits accompanying it, it was clear that the decision made by the first respondent was a decision which any decision maker, similarly circumstanced, would have made. It was not a decision that was so outrageous or in defiance of logic. In short it was not tainted with any type of 'Wednesbury unreasonableness' at all and therefore the applicant's allegation that the first respondent's decision was tainted with impropriety must fail (see paras 47, 52 & 57).

[Bahasa Malaysia summary

Holiday Villages of Malaysia Sdn Bhd ('pemohon') memiliki dan menjalankan kompleks percutian perkampungan berpadu Club Mediterranean Cherating Resort Village ('tempat peranginan'). Menurutnya, pemohon menggaji dua kategori pekerja di tempat peranginannya, iaitu pekerja tetap dan bermusim; pekerja bermusim merupakan pekerja yang digaji selama tempoh maksimum sepuluh bulan, iaitu dari bulan Februari

hingga November, dan tidak akan bekerja apabila tempat peranginan itu ditutup semasa musim tengkujuh. Pada 10 September 1997, responden kedua, kesatuan sekerja berdaftar di bawah Akta Kesatuan Sekerja 1959 ('Akta KS'), menuntut pengiktirafan daripada pemohon untuk mewakili kesemua pekerja pemohon, kecuali mereka yang bertugas di bahagian pengurusan, eksekutif dan kerahsiaan dan keselamatan, bermula dari 10 September 1997. Apabila pemohon gagal mematuhi, responden kedua memberitahu Ketua Pengarah Perhubungan Perusahaan ('KPPP') dan meminta KPPP mengambil tindakan terhadap pemohon di bawah s 9(4) Akta Perhubungan Perusahaan 1967 ('APP tersebut'). Kemudiannya, Jabatan Perhubungan Perusahaan tersebut ('JPP') meminta pemohon menyerahkan senarai pekerja seperti pada 10 September 1997, tidak termasuk mereka yang bertugas di bahagian pengurusan, eksekutif, kerahsiaan dan keselamatan. Pada masa yang sama, JPP juga meminta responden kedua menyerahkan senarai pekerja pemohon yang merupakan ahli kepada responden kedua. Responden kedua kemudiannya membuat aduan kepada JPP berkenaan kegagalan pemohon memberi pekerjaan kepada/menggaji semula 80 orang pekerja seperti pada 6 November 1997, tanpa apa-apa surat menyatakan sedemikian. Dalam hujah balas, pemohon mendakwa bahawa dari tempoh 2 November 1997 dan 8 November 1997, 86.5% pekerjanya telah menamatkan kontrak dan hanya 13.5% sahaja yang terus bekerja. Sebagai buktinya, pemohon menyerahkan senarai pekerja tetap dan bermusimnya ('senarai tersebut') seperti pada 10 September 1997. Oleh itu, pemohon memohon KPPP agar menentusahkan/mengesahkan keahlian sebelum memutuskan sama ada ingin mengiktiraf responden kedua. Responden kedua selepas itu menyerahkan Borang C yang mengandungi senarai keahliannya. Pengesahan keahlian dilakukan dan keputusannya menunjukkan 59.32% daripada pekerja pemohon merupakan ahli kesatuan tersebut. Apabila pemohon terus-terusan tidak mahu mengiktiraf responden kedua walau pun setelah keputusan diperoleh, KPPP mengeluarkan notis di bawah s 9(4C) APP kepada pemohon. Menjawab kepada notis tersebut, pemohon mendakwa bahawa hanya 10% pekerja tetapnya merupakan ahli kepada responden kedua dan adalah mustahil bahawa 50% daripada pekerja tetap dan bermusim pemohon merupakan ahli responden kedua. Maka, responden pertama memberitahu pemohon dan responden kedua berkenaan keputusannya di bawah s 9(5) APP yang mana dia telah memerintahkan pemohon mengiktiraf responden kedua sebagai kesatuan sekerja yang mewakili kesemua pekerja pemohon, berkuat kuasa dari 10 September 1997. Keputusan responden pertama ini kini dipersoalkan oleh pemohon atas alasan bahawa responden pertama terkhilaf dari segi undang-undang apabila gagal mengambilkira perkara-perkara yang seharusnya dipertimbangkan; telah salah arah dalam fakta dan undang-undang sewaktu mengambilkira pekerja bermusim pemohon apabila membuat keputusannya; maka oleh sebab itu, keputusan responden pertama dicemari kepenyalahan undang-undang, tidak masuk akal dan ketidakjujuran prosedur. Berdasarkan

alasan-alasan ini, pemohon memohon kajian semula kehakiman bagi satu perintah certiorari untuk membatalkan keputusan responden pertama. Semua pihak bersetuju bahawa mahkamah ini mempunyai bidang kuasa atas hal perkara ini dan bagi tujuan permohonan ini, tarikh yang relevan yang perlu difokuskan bagi perbincangan isu-isu ialah 10 September 1997. Perkara pokok yang menjadi pertikaian pemohon ialah, sama ada responden pertama seharusnya mempertimbangkan pekerja bermusimnya sebagai sebahagian daripada pekerja pemohon seperti pada 10 September 1997 dalam memberikan pengiktirafan kepada responden kedua.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam menjalankan tugasnya di bawah s 7 APP dan peraturan 4 Peraturan-Peraturan Perhubungan Perusahaan ('PPP'), KPPP memohon kepada Jabatan Kesatuan Sekerja untuk menentu dan memberitahu sama ada pekerja-pekerja dalam tuntutan pengiktirafan itu merupakan ahli kepada responden kedua. Proses ini menghendaki Jabatan tersebut menjalankan pengesahan keahlian bagi mendapatkan peratusan pekerja yang merupakan ahli responden, bagi tujuan tuntutan pengiktirafan itu. Kaedah pengiraan yang diguna pakai yang menjumlah kepada 59.32% adalah seperti yang ditetapkan di bawah peraturan 65 Peraturan-Peraturan Kesatuan Sekerja. Oleh itu, Jabatan Kesatuan Sekerja telah mematuhi undang-undang dalam mencapai peratusan pekerja tersebut (lihat perenggan 35–36).

(2) Undang-undang hanya memerlukan responden pertama menentukan peratusan keahlian kesatuan sekerja dalam maksud perwakilan responden kedua seperti pada tarikh tuntutan pengiktirafan iaitu 10 September 1997 dan bukannya pada tarikh yang lain. Oleh itu, proses penentusahan keahlian yang dilakukan bagi tujuan tuntutan pengiktirafan tersebut adalah berdasarkan jumlah pekerja pada tarikh yang betul. Fakta bahawa 86.5% pekerja pemohon tidak lagi bekerja dengannya seperti pada 16 Disember 1997 tidak relevan dan bukanlah faktor yang perlu dipertimbangkan dalam perkiraan peratusan tersebut. Walau apa pun, pemohon terikat dengan fakta bahawa pekerja bermusimnya harus juga diambil kira. Tambahan pula, ekshibit pemohon menunjukkan bahawa majoriti pekerja pemohon yang diambil bekerja seperti pada 10 September 1997 juga telah diambil bekerja dari Januari 1998. Oleh itu, terdapat cukup data menyokong keputusan peratusan keahlian seperti pada 10 September 1997 ialah 59.32%. Ini bermakna bahawa responden pertama mengambilkira kesemua perkara relevan apabila dia membuat keputusan dan maka dengan itu, persoalan yang ditimbulkan oleh permohonan tidak berasas (lihat perenggan 39 & 42).

(3) Tiada kehendak undang-undang yang memerlukan responden pertama membezakan antara pekerja tetap dan bermusim bagi tujuan pengiktirafan kesatuan sekerja. Terma 'workman' dan 'contract of employment' seperti yang ditakrifkan dalam s 2 PPP tidak mengecualikan pekerja bermusim, kerana Peraturan tersebut tidak menjelaskan tempoh bekerja yang diperlukan sebelum seseorang 'workman' boleh dilindungi di bawah Akta tersebut. Oleh itu, tiada perbezaan antara pekerja tetap dan bermusim berdasarkan undang-undang dan pekerja bermusim seharusnya setara hak mereka. Lagi pula, s 17A Akta Tafsiran 1948 dan 1967 menghendaki agar maksud Akta tersebut dipertimbangkan. Maka, untuk mencapai tujuan atau objektif PPP tersebut, seharusnya tiada perbezaan antara pekerja tetap dan bermusim kerana, jika adanya perbezaan, akan menimbulkan sesuatu yang tidak munasabah kerana apa yang perlu dilakukan oleh majikan hanyalah mengklasifikasikan pekerja-pekerjanya sebagai 'pekerja bermusim' untuk mengelak liabiliti di bawah PPP. Oleh itu, alasan kedua yang menjadi pertikaian terhadap responden pertama bahawa dia telah salah arah dalam fakta dan undang-undang dengan mengambilkira pekerja bermusim pemohon dalam mencapai keputusannya juga tidak berasas (lihat perenggan 43).

(4) Dalam surat pemohon kepada KPP, jelas menyatakan bahawa kedua-dua pekerja tetap dan bermusim mesti diambil kira sebelum pengiktirafan diberikan kepada responden kedua dan bagi tujuan pengesahan keahlian, di mana responden pertama telah pun mengambilkira perkara-perkara ini. Tetapi, di hadapan mahkamah, pemohon menyatakan bahawa memandangkan pekerja bermusim tidak akan bekerja dengannya seperti pada 10 September 1997, mereka tidak seharusnya diambil kira dalam perkiraan peratusan pekerja. Pendirian pemohon berbelit-belit dan bercanggah dalam termanya dan sepatutnya dilarang membangkitkan isu ini, yang mana bukanlah isu, sekali lagi. Responden pertama, dari mula, secara jelas dan tanpa ragu menegaskan bahawa dia mengambilkira kedua-dua pekerja tetap dan bermusim walaupun majoriti daripada mereka tidak lagi bekerja dengan pemohon selepas November 1997, kerana mereka masih lagi bekerja dengan pemohon seperti pada 10 September 1997, iaitu pada tarikh tuntutan pengiktirafan itu. Setelah meneliti afidavit dan lampiran ekshibit responden pertama, adalah jelas bahawa keputusan yang diambil olehnya, adalah keputusan yang kebiasaannya akan diambil, oleh mana-mana pembuat keputusan, dalam situasi serupa. Keputusan itu bukanlah keputusan yang melampau atau tidak munasabah. Ringkasnya, keputusan itu tidak dicemari dengan sebarang 'Wednesbury unreasonableness'. Maka, tuduhan pemohon bahawa keputusan responden pertama dicemari oleh ketidakjujuran tidak berasas (lihat perenggan 47, 52 & 57).]

Notes

For cases on application for, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on construction of statutes in general, see 11 *Mallal's Digest* (4th Ed, 2005) paras 1836–2049.

Cases referred to

Associated Provincial Picture House Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Booi Kim Lee v YB Menteri Sumber Manusia & Anor [1999] 3 MLJ 515 (refd)

Council of Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374 (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Anor [2005] 5 MLJ 193 (refd)

Korea Development Corp & Construction Worker's Union [1983] ILR Vol 2 (refd)

Minister of Labour Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 (refd)

Pahang South Union Omnibus Co Bhd v The Minister of Labour & Manpower & Anor [1981] 2 MLJ 199

Reg v Entry Clearance Officer, Bombay, Ex p Amin [1983] 2 AC 818 (refd)

Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 2, 9, 9(2), 9(3), 9(3)(b), 9(4), 9(4A), 9(4B), 9(4C), 9(5), 9(6), 10(2), 10(3)
Industrial Relations Regulations 1980 regs 4, 4(1), 14
Interpretation Acts 1948 and 1967 s 17A
Public Authorities Protection Act 1940 s 2(b)
Trade Unions Act 1959 s 26(3)
Trade Unions Regulations 1959 regs 5, 62, 63, 64, 65, 66

Gan Khong Aik (Lee Hishammudin Allen & Gledhill) for the applicant.
Afandi Nazilah bin Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
B Lobo (Lobo and Associates) for the second respondent.

Suraya Othman JC (now J):

INTRODUCTION

[1] This is an application by the applicant (Holiday Villages of Malaysia Sdn Bhd) for judicial review for an order of certiorari to quash the decision

of the first respondent (Menteri Sumber Malaysia) made on 1 June 1998 under s 9(5) of the Industrial Relations Act 1967 (Act 177) ('IR Act') ordering the applicant to accord recognition to the second respondent (Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran Semenanjung Malaysia) as a trade union representing all employees of the applicant excluding those in the managerial, executive, confidential and security capacity.

FACTS AND BACKGROUND

[2] Briefly, the facts of the case are as follows:

(1) The applicant is a company incorporated in Malaysia and owns and operates an integrated holiday village complex known as Club Mediterranean Cherating Resort Village.

(2) The second respondent is a trade union of workmen registered under the Trade Unions Act 1959 ('TU Act').

(3) The applicant employed two categories of employees, permanent and seasonal employees. The seasonal employees are, according to the applicant, employed for a maximum period of about 10 months from February to November and whose employment will cease when the resort closed for business during the period commonly known as the 'monsoon period' affecting the east coast of West Malaysia (late November to January). The seasonal employees may or may not be employed thereafter, depending on various factors including whether the employees wish to be re-employed by the applicant.

(4) On 10 September 1997, the second respondent claimed recognition in Form A from the applicant, to represent all the employees other than those in the managerial, executive, confidential and security capacity with effect from 10 September 1997.

(5) Since there was no feedback from the applicant, the second respondent by a letter dated 10 October 1997, informed the Director General of the Industrial Relations ('DGIR') about the claim of recognition and requested that action be taken under s 9(4) of the IR Act.

(6) By a letter dated 25 October 1997, the Industrial Relations Department ('IRD') requested the applicant to submit a list of their employees as at 10 September 1997 excluding those who are employed in the managerial, executive, confidential and security capacity in Form B. Meanwhile, the second respondent was also requested to submit a list of the applicant's employees who were their members in Form C.

(7) By a letter dated 7 November 1997, the second respondent made a complaint to the IRD that the applicant has refused to continue to employ about 80 employees as from 6 November 1997 without giving them any letter to the effect.

(8) On 16 December 1997, the applicant informed the DGIR by a letter that the contract of employment of many of their employees had come to an end around the period between 2 November 1997–8 November 1997 and as at 16 December 1997, 86.5% of their employees has ended their contract and only 13.5% of their employees still continue with their employment. In view thereof, the applicant requested the DGIR to carry out a membership verification in deciding whether to accord recognition to the second respondent. The applicant also submitted Form B with the list of their employees, permanent and seasonal as at the relevant date ie 10 September 1997 (see encl 1A, exh 'A-3' of the applicant's affidavit).

(9) By a letter dated 3 January 1998, the second respondent submitted Form C together with the list of its members names.

(10) On 26 January 1998, the Trade Union's Department ('TUD') informed the applicant and the second respondent by letter that a membership verification exercise will be conducted and all the necessary steps will be taken by Pengarah Kesatuan Sekerja Selangor, Wilayah Persekutuan Pahang.

(11) By a letter dated 21 February 1998, the Jabatan Hal Ehwal Kesatuan Sekerja informed the second respondent and the applicant that a membership verification exercise will be conducted on 26 February 1998.

(12) By a letter dated 12 March 1998, Jabatan Hal Ehwal Kesatuan Sekerja informed the results of the membership verification to the DGIR. It showed that 59.32% of the employees are members of the union.

(13) The IRD informed the applicant and the second respondent about the result of the membership verification by a letter dated 9 April 1998 and advised the applicant to accord recognition to the second respondent.

(14) The applicant failed to accord recognition to the second respondent and the DGIR gave notice under s 9(4C) of the IR Act to the applicant by a letter dated 2 May 1998.

(15) The applicant replied by letter dated 26 May 1998, informing the IRD that their investigation of the union membership showed:

A

(a) less than 10% of the applicant's permanent employees are the second respondent's members:

(b) it was impossible that 50% of the applicant's permanent employees and seasonal employees are the applicant's members; B

(c) for the purpose of membership verification, the membership of both the permanent and seasonal employees ought to be taken into account (see encl 1A exh 'A-9' of the applicant's affidavit).

C

(16) By letter dated 8 June 1998, the applicant and second respondent were informed of the first respondent's decision dated 1 June 1998 made under s 9(5) of the IR Act by which he had ordered the applicant to recognise the second respondent as a trade union representing all the applicant's employees with effect from 10 September 1997. A copy of D the said letter and the first respondent's said decision is marked as exh 'A-10' attached to the applicant's affidavit. It is that decision that is now being challenged by the applicant herein.

GROUNDS FOR JUDICIAL REVIEW BY THE APPLICANT E

[3] The applicant challenged the first respondent's decision on grounds as follows:

(1) The first respondent had committed an error of law when he had acted F without sufficient material or evidence and failed to take into account matters which he ought to take into account.

(2) The first respondent misdirected himself in fact and in law when he considered the seasonal employees of the applicant in coming to his G decision.

(3) Because of (1) and (2) above, the first respondent decision was tainted with illegality and irrationality and procedural impropriety.

THE ROLES AND THE FUNCTIONS OF THE COURT IN JUDICIAL H REVIEW

[4] The principles relating to the function of the court in dealing with judicial review has been well enunciated in a number of authorities. First and I foremost is the principle that the court does not act as an appeal court in such matters. This is cited in the case of *Reg v Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818 at p 829 where Lord Fraser of Tullybelton observed that:

> Judicial review is concerned not with merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal It is made effective by the courts quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

(See also *Minister of Labour Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 11 and *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour & Manpower* [1980] 2 MLJ 189 at p 190).

WHEN CAN THE COURT INTERFERE

[5] The Federal Court in the case of *Pahang South Union Omnibus Co Bhd v The Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199 at p 202 states that:

> it is settled law that the court may exercise its judicial power and interfere if the decision making body is influenced by considerations which ought not to influence it or fails to take into account matters which it ought to take into account.

[6] And in *Minister of Labour Malaysia v Lie Seng Fatt*, the Supreme Court states that when the law vests a discretion on an authority, that authority is given a very wide discretion but such discretion is not unlimited. As long as the authority concerned had exercised the discretion without improper motive the exercise of discretion must not be interfered with, unless it can be shown that the particular authority *had misdirected itself, had taken into account irrelevant matters or had not taken into consideration relevant matters or that the decision militates against the object of the statute*

(Emphasis added.)

[7] Furthermore, Lord Diplock in the case of *Council of Civil Service Unions & Ors v Minister of Civil Service* [1985] AC 374 as adopted by Justice KC Vohrah in *Booi Kim Lee v YB Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515 at p 521 has classified the grounds subject to control by judicial review under the following heads:

(a) Illegality —	the authority concerned has been guilty of an error of law in its action, ie purporting to exercise a power it does not have.
(b) Irrationality —	the authority exercise a power in so an unreasonable manner (Wednesbury principle).
(c) Procedural Impropriety —	failure of the authority to observe procedural rules even though such failure does not involve any denial of natural justice.

THE PROVISIONS UNDER THE ACTS AND REGULATIONS

[8] It is pertinent before delving into the issues, that certain provisions of the law under the relevant Acts and regulations are laid down. The relevant law applicable to the issues are the Industrial Relations Act 1967 (Act 177) ('IR Act'), Trade Union Act 1959 (Act 262) ('TU Act'), Industrial Relations Regulations 1980 ('IR Regulations') and the Trade Union Regulations 1959 ('TU Regulations').

[9] The relevant provision for the recognition of trade union is provided under s 9 of the IR Act.

[10] Section 9(2) of the IR Act provides for trade union to serve on the employer in writing a claim for recognition.

[11] An employer who has been served with such a claim may after 21 days from service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded notify the trade union concerned in writing the grounds for not according recognition; or

(c) apply in wiring to the DGIR to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union (s 9(3)).

[12] If the trade union received a notification under s 9(3)(b) of the IR Act or where the employer concerned fails to comply with s 9(3) of the IR Act the trade union may report to the DGIR in writing (s 9(4)).

[13] Section 9(4A) of the IR Act provides that upon receiving an application under s 9(3) or a report under s 9(4) the DGIR is empowered to take steps or make inquiries to resolve the matter.

[14] In order to perform his function under s 9(4A) the DGIR is vested with the powers to require the trade union, the employer or trade union of employees to furnish any information he deems necessary.

[15] The DGIR is also given the discretion by s 9(4B) of the IR Act to refer to the DGTU for the DGTU's decision on any question of the competence of the trade union to represent any workmen in respect of whom recognition is sought.

[16] If the DGIR cannot resolve the matter pursuant to s 9(4A) of the IR Act he shall notify the Minister.

[17] The Minister is required by s 9(5) of the IR Act to give his decision either to accord recognition or otherwise.

[18] Whereas in TU Act, s 26(3) states that in a situation where a trade union has served a claim for recognition, the DGIR may request the DGTU to carry out a membership check in a manner prescribed by regs 63, 64, 65 and 66 of the TU Regulations. The purpose is for ascertaining the percentage of workmen in respect of whom recognition is being sought, who are members of the union making the claim.

[19] The DGTU may in writing notify the trade union making a claim for recognition that a membership check would be conducted either by membership verification or by a secret ballot. A copy of such notification shall be sent to the employer (reg 63 of the TU Regulations).

[20] Both the employer and the trade union are to assist the DGTU with information as he may require to enable the DGTU to conduct the membership check (reg 64 of the TU Regulations).

[21] Regulation 65 of the TU Regulations prescribed the formula to ascertain the percentage of membership as follows:

(a)	Membership Verification Total number of valid members As at the date of the claim x 100% Total number of workmen in respect of whom recognition is being sought at the date of the claim
(b)	Membership check by secret ballot Number of votes indicating membership x 100% Number of workmen entitled to vote

[22] The DGTU shall notify the DGIR the result of the membership check (reg 66 of the TU Regulations).

GROUNDS OF JUDGMENT

[23] At the outset all parties agreed that there is no issue as to the effect of the ouster clause, ie s 9(6) of the IR Act and that this court has jurisdiction. Parties also agreed that for the purposes of this application the relevant date to focus on issues is the date recognition was sought ie 10 September 1997.

[24] I shall now deal with this application. The grounds as put up by the applicant are three folds but in essence, the main thrust of the ground of challenge by the applicant was premised on one main issue, primarily that the first respondent in according recognition to the second respondent should not have included the seasonal employees as being part of the applicant's employees as at 10 September 1997.

[25] Having said that, after perusing the applicant's affidavit with its accompanying exhibits and hearing Mr Gan Khong Aik for the applicant, this court feels that the applicant's stand is convoluted and a contradiction in terms. The applicant is blowing hot and cold. What was said in submission, what is stated in the affidavit and what is in the applicant's exhibits runs contrary to each other.

[26] In the applicant's submission, Mr Gan contended that the first respondent erred in law when he failed to take into account both permanent and seasonal employees for membership verification, then in the second breath he alleged that the first respondent misdirected himself when he considered the seasonal employees as part of the employees of the applicant in coming to his decision, then in his third breath submitted that the seasonal employees ought not to be taken into account in deciding whether more that 50% of the applicant's employees are members of the second respondent. With such erratic and unclear stand taken by Mr Gan, I have to ask myself what were the actual materials or evidence that was put before the first respondent, before he made that decision on 1 June 1998.

[27] There were two letters from the applicant which were material and of utmost importance which led to the first respondent according recognition to the second respondent to represent all employees of the applicant excluding those in the managerial, executive, confidential and security capacity. These letters are mentioned in paras 8 and 15 under the heading facts and background, that is the letter dated 16 December 1997 and 26 May 1998 respectively.

[28] The first letter dated 16 December 1997 was in response to the DGIR in relation to the claim for recognition by the second respondent to represent the applicant's employees. In that letter, the applicant informed the DGIR that the contract of employment of many of their employees had come to an end around the period between 2 November 1997 – 8 November 1997 and as at 16 December 1997, 86.5% of their employees have ended their contract and only 13.5% of their employees still continue with their employment. In view thereof, the applicant requested, in fact supported the DGIR's proposal to carry out a membership verification in deciding whether to accord

recognition to the second respondent. The applicant also submitted Form B with the list of their employees, permanent and seasonal as at the relevant date ie 10 September 1997.

[29] The second letter, dated 26 May 1998 was in response to the letter by IRD informing the applicant that the membership verification showed 59.32% of the applicant's employees are members of the second respondent and also in response to the notice received from the DGIR under s 9(4C) of the IR Act to accord recognition to the second respondent.

In that letter the applicant stated as per below:

> Pemeriksaan kami ke atas keahlian Kesatuan tersebut di atas menunjukkan bahawa tidak sampai 10% pekerja tetap kami adalah ahli Kesatuan tersebut di atas. Pemeriksaan kami juga menunjukkan bahawa tidak mungkin 50% daripada ke semua pekerja tetap dan bermusim kami adalah ahli Kesatuan tersebut di atas. *Adalah pendapat kami untuk tujuan pengiktirafan, keahlian Kesatuan tersebut di atas mesti mengandungi kedua-dua pekerja tetap dan bermusim. Hanya mengadakan pekerja bermusim sebagai ahli Kesatuan tersebut adalah tidak memberi gambaran yang betul tentang kedudukan pekerja kamu.*

[30] The English translation, in gist:

> Our investigation shows that not more than 10% of our permanent employees are members of the said Union. Our investigation also shows that it is not possible that 50% of all our permanent and seasonal employees are member of the said Union. *It is our opinion that for the purpose of recognition, the members of the union must contain both the permanent and seasonal employees. Having only seasonal employees as members of the said union will not give a true reflection of the status of our employees*
>
> (Emphasis added.)

[31] Looking at the said letter above, it is crystal clear that the applicant wanted both the seasonal and permanent employees to be taken into account, ie both categories must be members of the union before recognition can be accorded to the second respondent. In other words for the purpose of membership verification, the membership of both the permanent and seasonal employees ought to be taken into account, and the combination of the two categories of employees must be more than 50% before representation by second respondent can be accorded.

[32] Having explicitly said this in their letter, the applicant cannot now come to court and retract and change tune. This was what happened on the 25 September 1998, whereby Mr Gan once again changed gear and submitted that since the seasonal employees as at 10 September 1997 will not

be with the applicant thereafter, they therefore should not be included in calculating the percentage, again shifting his stand to suit his whims and fancies.

[33] As stated earlier, I have to ask myself what were the actual materials or evidence that was put before the first respondent, before he made his decision to accord recognition on 1 June 1998. Since Mr Gan's submission was convoluted, I have to seek assistance from Mr B Lobo and En Afandi Nazilah to sieve through the exhibits to get a true perspective of the whole situation.

(1) *Whether the first respondent had committed an error of law when he had acted without sufficient material or evidence and failed to take into account matters which he ought to take into account.*

(2) *Whether the first respondent misdirected himself in fact and in law when he considered the seasonal employees of the applicant in coming his decision.*

[34] It has to reiterated that parties has agreed that for the purpose of this application the relevant date to focus on issues is the date recognition was sought vide statutory Form A filed with the DGIR which is on 10 September 1997 (the relevant date).

[35] On receiving the claim for recognition, the process under s 9 of the IR Act takes its course. The DGIR in carrying out his functions under s 9 of the IR Act and reg 4 of the IR Regulations, requested the DGTU to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition is made are members of the trade union making the claim. In relation to this the DGIR under s 26(3) of the TU Act requested the DGTU to carry out a membership verification exercise for the purpose of ascertaining the percentage of the workmen in respect of whom recognition is being sought, who are members of the union making the claim. The DGTU under regs 63 and 64 carried out a membership verification as illustrated in the first respondent affidavit, exh B7 and arrived at the figure 59.32%, being the percentage of workmen in respect of whom recognition is being sought, who are members of the union making the claim.

[36] The manner of calculation arrived at by the DGTU was as prescribed under reg 5 of the TU Regulations. Therefore it can be seen that the DGTU did follow strictly the letters of the law before coming to his conclusion on the percentage of workmen.

[37] The applicant claims that there are two categories of employees as at 10 September 1997; the first category is 'group *A*' (permanent basis) and the second category is 'group *B*'(seasonal basis). The applicant also claims that the employees who were on the applicant's payroll as at 10 September 1997 were

no longer with the applicant from November 1997. Their contract of employment had come to an end from 2 November 1997 till 8 November 1997.

[38] The applicant made a distinction between the permanent and seasonal employees. Is there such a distinction under the law? The applicant while agreeing to the relevant date ie 10 September 1997 as being the cut off date to ascertain the percentage of its workmen, who were members of the second respondent, harped on the fact that a majority of them will be leaving their employment after November 1997. Is this a consideration which the first respondent has to take.

[39] Firstly, the law only requires the DGTU and the first respondent to ascertain the percentage of trade union membership within the second respondent's scope of representation as at the date of the claim of recognition, ie 10 September 1997 and not at any other dates, (see reg 4(1) of the IR Regulations).

[40] Regulation 62 of the TU Regulations also provides:

> 'date of claim' means the date as of which Form A prescribed under the Industrial Relation Regulations 1980 is dated.

[41] In *Korea Development Corp & Construction Worker's Union* [1983] ILR Vol 2, the industrial court held that the membership check that was carried out by the Registrar of Trade Unions was for the purposes of determining whether the majority of employees of the company are members of the union. The date of the claim for recognition is the relevant date. It does not matter if at the time of the check, the employees had resigned from the union or that more employees had been employed by the company.

[42] Therefore the membership verification exercise done for the claim for recognition was based on the number of workmen as at the correct date. The fact that 86.5% of the applicant's employees were no longer in the employment of the applicant as at 16 December 1997 was of no relevance and should not be a factor for consideration in calculating the percentage. Anyway, the applicant is bound by its letter dated 26 May 1998 whereby it opined that for the purpose of recognition, both the permanent and seasonal employees has to be taken into account for the purpose of membership verification. Looking at the applicant's exhs (A3 and A7), the majority of the employees employed by the applicant as at 10 September 1997 were also employed by the applicant from January 1998. Taken in this light, there was more that sufficient material and evidence to support the finding of the 59.32% percentage of membership as at 10 September 1997 and as such the

first respondent had taken all the relevant matters into account when he made his decision on 1 June 1998. Therefore the first ground of challenge must fail.

[43] Secondly, there is no legal requirement for the DGTU or the first respondent to distinguish between seasonal or permanent workmen for purposes of trade union recognition. The term *workman* under s 2 of the IR Act is defined as '... *any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward* ...'. The term *contract of employment* in that same section is defined as '... *any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman*'. By such definitions, the terms 'workman' and 'contract of employment' under the said Act does NOT exclude seasonal employees. This is so since it does not spell out the duration of employment needed before one can be considered a 'workman' and thus receive protection under the Act.

[44] The contention that there is no distinction between permanent and seasonal employees can be seen in the case of *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193. In this case, one of the grounds for the appellant to seek certiorari to quash the decision of the first respondent was the illegal exclusion of temporary employees from the scope of representation of the second respondent. The Court of Appeal referred to s 2 of the IR Act which defines a workman as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute *includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute*. Therefore the Court of Appeal held that:

> Based on the above mentioned statutory provisions, it would be wrong to exclude workmen who do not fall within the four categories above mention from the scope of union representation. *Clearly, it would be illegal to exclude temporary employees from the scope of representation of the union. In fact no distinction is made between temporary, casual or permanent employees* ...
>
> We would think at the very least, the DGTU was obliged statutorily to verify whether the employees in the amended list were employees within the scope of representation. It *is our view that the failure of the DGTU to include the temporary and casual employees in the verification exercise was an error committed in breach of the provisions of the TU Act and the IR Act and this nullified the entire recognition exercise*.

[45] As can be seen there is no distinction made between temporary, casual or permanent employees as far as the law is concerned. Likewise, seasonal employees, they too should be treated the same. Under s 17A of the

Interpretation Acts 1948 and 1967 (Act 388), due regard must be given to the purpose of the Act. Section 17A stated:

> 77/4. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[46] Therefore to promote the purpose or object of the Act, there should not be any distinction made between one and the other (seasonal and non-seasonal workmen). As submitted by Mr B Lobo, the definition of a contract of employment does not relate to the length of time or period of employment, otherwise it would lead to absurdity, for all an employer has to do is to simply classify his employees as 'seasonal employees' and thereby escape the statutory liabilities under the IR Act. This should not be allowed as it would defeat the purpose and object the IR Act was enacted in the first place. Taken in this light, the second ground of challenge too must fail.

(3) Whether the first respondent's decision was tainted with illegality and irrationality and procedural impropriety

[47] Mr Gan contended that the first respondent had come to a decision which no reasonable man similarly circumstanced would have come to. This is so since the first respondent's decision is tainted with 'Wednesbury unreasonableness' in that his decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[48] He further contended that had the first respondent applied his mind and exercised his power judicially:

(a) he would have acted in compliance with the regulation to check the membership verification evidence before coming to the conclusion that there are 59.32% of the employees of the applicant who are members of the second respondent and according recognition to the second respondent;

(b) he would have given due consideration to or inquire on the facts raised by the applicant or given his reasons in disregarding those facts;

(c) he would not have proceeded to accord recognition to the second respondent by acting in toto the recommendation of the DGIR and DGTU without first verifying and determining the number and of workmen within the scope of representation of the second respondent who are actually the members of the second respondent; and

(d) he alternatively ought not to take into account the seasonal employees in determining the percentage of the employees of the applicant who are the members of the second respondent.

[49] It must be noted that there are two types of 'Wednesbury unreasonableness', the *first* type of 'Wednesbury unreasonableness' which refers to the term 'unreasonableness' in the *broad* sense of that term and the *second* type of 'Wednesbury unreasonableness' which refers to a decision which is so outrageous or in defiance of logic that no sensible person who has applied his mind to the question could have arrived at such a decision. The distinction between these two types of 'Wednesbury unreasonableness' was highlighted and expounded in the Supreme Court case of *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417.

[50] In the case of *Associated Provincial Picture House Ltd v Wednesbury Corp* [1948] 1 KB 223, Lord Greene MR stated at p 230 that:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere. That, I think, is quite right; *but to prove a case of that kind would require something overwhelming* ...

[51] The test of unreasonableness as enunciated in the above case is not what the courts think is unreasonable, but unreasonableness here is something so absurd that no reasonable or sensible person could have come to that decision. And in our present case, the applicant has alleged the second type of 'Wednesbury unreasonableness' (which is also referred to as 'manifest unreasonableness') and for it to apply, the applicant has to prove something 'overwhelming'.

[52] The issue here then is whether the applicant has succeeded in proving that the first respondent's decision is a decision which any decision maker, similarly circumstanced, would not have made.

[53] As averred to earlier, when answering the first and second ground of challenge, I had intimated that the DGTU, DGIR and the first respondent had followed strictly the letters of the law before coming to the conclusion on the percentage of workmen ie that 59.32% of the applicant's employees are members of the second respondent as at 10 September 1997.

[54] It must be remembered that the function of the DGTU is not adversarial but inquisitorial. This is on the authority of the Supreme Court in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124, at p 129. That case also decided that in exercising his functions,

the DGTU (then known as the registrar of trade unions) had an unfettered discretion which was only subject to the duty to act responsibly in the 'Wednesbury' sense.

[55] Again, as averred to earlier, the decision of the first respondent depended on what materials and evidence were put before him and it must be reiterated that the two letters from the applicant dated 16 February 1997 and 26 May 1998 played a crucial role in the first respondent decision. In the letter dated 26 May 1998 the applicant opined that both its permanent and seasonal employees ought to be taken into account for the purpose of membership verification and the DGTU did just that and the first respondent acquiesced to the applicant's wishes. As such, why is the applicant now quarrelling and harping on this issue. The applicant should be estopped in raising this issue again. It is a non-issue.

[56] As to giving of reasons for his decision to accord recognition, this can be found in paras 6, 7, 9, 10, 13, 14 and 15 of the first respondent's affidavit. The first respondent has taken into account the letter of complaint from the second respondent that 80 employees of the applicant had their services terminated as from 6 November 1997 in violation of s 10(2) and (3) of the IR Act which made it an offence for an employer to terminate the services of its employees once a claim for recognition is filed; the letter dated 16 December 1997 from the applicant informing that a majority of its seasonal employees had left from 2 November 1997 – 8 November 1997 and the applicant's support for a membership verification exercise to be done; the Forms B and C forwarded by the applicant and second respondent listing their employees and members respectively and the result of the verification exercise and the manner in calculating the percentage by the DGTU. The first respondent too has stated clearly and equivocally that he has taken both seasonal and permanent employees into account even though a majority of them had left the applicant's service after November 1997 since these employees are as at 10 September 1997, ie the date recognition was sought still the employees of the applicant.

[57] Therefore after perusing the first respondent's affidavit and the exhibits accompanying it, I feel that the first respondent's decision made on 1 June 1998 is one which any decision maker, similarly circumstanced, would have made it. It is not a decision that is so outrageous or in defiance of logic. In short it is not tainted with any 'Wednesbury unreasonableness' at all, whether of the first or second type. The third ground of challenge too must also fail.

CONCLUSION

[58] In light of the reasons above, the applicant has failed to show any valid or cogent grounds upon which this court can exercise its discretionary power of judicial review to quash the decision of the first respondent.

[59] The application is therefore dismissed with costs. Cost of the first respondent will be carried on a solicitor and client basis pursuant to provision of s 2(b) of the Public Authorities Protection Act 1940 (Act 198).

Application dismissed with costs.

Reported by K Nesan